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No. 84-648

In The Supreme Court of the United States

October Term, 1984

SEDIMA S.P.R.L.,

Petitioner,

vs.

IMREX COMPANY INC., JACOB ARMON and GIDON ARMON,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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SEDIMA S.P.R.L.,
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Brief in Opposition to the Petition For a Writ of Certiorari

STATEMENT

Respondents Imrex Company, Inc., Jacob Armon and Gidon Armon, respectfully submit that the Petition for a Writ for Certiorari herein should be denied.

No additional statement of facts other than those described in the petition and the opinion below are necessary for the Court's consideration of the Petition at this time.

REASONS FOR DENYING THE WRIT

POINT I

The Court Below Properly Held That "RICO-Type Injury" Must be Alleged.

The Second Circuit's decisions in the instant case and its companion cases have been the subject of

much popular commentary and, in recent months, have been analyzed by and referred to in decisions of at lease two other Circuit Courts of Appeal.* A careful review of the Second Circuit cases shows that they represent perhaps the most comprehensive statement of the legislative history and intent of 18 USC 1961 et. seq. ("Civil RICO"), and the most reasoned analysis of the scope of the act which has ever been made in the Federal Courts.

The most significant criticisms made by petitioner herein may be summarized as follows:

1. The imposition of a "RICO type injury" requirement is merely a retreat to the now-discredited requirement that a connection must be alleged between the defendants in the civil RICO suit and "organized crime."

2. The requirement of a prior criminal conviction of predicate acts has no basis in a reading of the statute, and never was intended by the Congress.

3. The Court's opinion below represents an unwarranted exercise in "judicial activism," which goes clearly beyond the expressed intent of the scope of the statute.

We shall consider each of these important criticisms *seriatim.*

**Alexander Grant and Company v. Tiffany Industries, Inc.*, No. 83-1608 (8th Cir. Aug. 2, 1984).

Haroco, Inc. v. American National Bank and Trust Company of Chicago, et al., No. 83-2529 (7th Cir. Oct. 19, 1984).

First and foremost is the requirement that a plaintiff under civil RICO plead and prove a "RICO-type injury." *Stripped to its essentials, this standard requires pleading of injury to the purported victim beyond that which results directly from the individual predicate acts as defined in 18 USC 1961.* In this regard, it can be said that both *SEDIMA* and *Bankers Trust Co. v. Rhoades*, __ F.2d __, imposed precisely the same rule.

We need not restate the lengthy citations of cases both in the District Courts and the Circuit Courts of Appeal which have found themselves on either side of this issue.*

A detailed review of the decisions reveals that the courts which do not require the pleading and proof of a "RICO-type injury" beyond that of the individual predicate acts themselves, have resorted to a purely mechanistic reading of the statute. The result is the "extraordinary, if not outrageous"* application of the statute to all varieties of disputes. The necessary "enterprise" itself is more often than not a legitimate business entity. The "pattern of racketeering" is merely the alleged commission of one or more predicate offenses in the course of operation of the "enterprise." Nearly every "garden variety" commercial fraud, bankruptcy fraud, securities fraud or common-law conversion or breach of contract action can, by virtue of this expansive reading, be converted

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*A review of these cases appears in the opinion below at pages 20a and 21a. Page numbers used herein refer to the Appendix to the Petition.

*Opinion below at page 9a.

into a Civil RICO action. Most troublesome of all are the predicate acts which were alleged to sustain the RICO claims in the instant action—the allegations of acts of wire fraud and/or mail fraud. The federal courts have read these criminal statutes so broadly that they now permit, if not demand, that almost every commercial dispute be converted into a RICO claim.

The clear import of the imposition of a "RICO-type injury" standing requirement is to require *at least the allegations of injury which the RICO law was intended to prevent.* There can be no doubt that the federal courts have wrestled with this concept, and some, finding a "RICO-type injury" hard to define, have given up the fight and retreated to the mechanistic analysis referred to, *supra.*

The chief criticisms of the "RICO-type injury" standing requirement are, first, that it imposes restrictions drawn from the courts' experience with the Clayton Act, 15 USC Sec. 15(a), without express language in the statute to that effect, and second, that it creates a distinction between so-called "direct" and "indirect" injury which negates the intent of the statute. Each of these criticisms is inappropriate and incorrect.

The Court below, in its extensive opinion, detailed at great length the interrelation between the genesis of civil RICO and the consideration of its relationship with the then-existing antitrust laws. The Court, in the instant case, has held that Clayton-Act type standing requirements are appropriately imposed under RICO, given the fact that Civil RICO was clearly "modeled after" the then-existing Clayton Act provi-

sions. The Court below correctly referred to the case of *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 US 477 (1977) in determining that there must be the existence of a "RICO-type injury" as a predicate for the commencement of the Civil RICO action.

Petitioner claims that the requirement of a "RICO-type injury" is effectively the same as a reimposition of the requirement that a connection with organized crime be alleged by plaintiffs. The issue of whether or not the phrase "organized crime" should be utilized in judicial analysis of RICO should be put to rest once and for all. It is clearly the consensus of the Circuit Courts that a private RICO plaintiff need not plead or prove that the defendants in a civil RICO action are connected with, or are members of, "organized crime."*

Many courts have commented on the specific reasons why the terms "organized crime," "Mafia," or "Cosa Nostra" were not included in the statutory language of RICO. This was because the Supreme Court had declared as constitutionally improper the imposition of "status offenses." See *Robinson v. California*, 370 U.S. 660 (1962). While the phrase "organized crime" may have some usefulness for the public press, in legislative debate, and even perhaps for the every-day actions of law enforcement agencies, we submit that it simply has no place in determining the intent or scope of Civil RICO. Why then has the claim been made that an "organized-crime connection" is now born again as the requirement of "RICO-type injury?" Simply because, in the use of

*See citations in petition at page 18.

strong language, the Court below referred once in its lengthy opinion to "mobsters."* Not only does petitioner claim that the Court below has now imposed a requirement that the defendants be "mobsters." A similar comment may be found in the Court's analysis in *Haroco v. American National Bank and Trust Company, supra*, at pg. 20 of that opinion. We submit that the Court below did not hold that there must be a pleading or proof or connection between the defendants and "mobsters." There simply must be a pleading and proof of "RICO-type injury" as discussed in detail in the opinion.

What then is proper "RICO-type injury?" The instant case, for the first time among the circuits, accepted and synthesized two theoretical strands which have appeared in numerous District Court cases around the country. The first is the notion of a "racketeering enterprise injury," which the District Court defined as an injury which occurs where the "defendants ability to harm the plaintiff is enhanced by the infusion of money from a pattern of racketeering acts into the enterprise." District Court Opinion at pg. 62a. The second is a requirement of "competitive injury," defined by the Court below as an "injury to business or property stemming from competitive harm." Opinion at pg. 5a.

Some Courts, based upon part of the analysis in *Schacht v. Brown*, 711 F2d 1343 (7th Cir. 1983) have been confused that the imposition of a "RICO-type injury" requires a distinction between "direct" and "indirect" injury. We respectfully suggest that the

*At opinion pg. 27a.

direct/indirect injury analysis is erroneous, and undermines a proper analysis of Civil RICO. Horror stories abound in the opinions of the Circuit Courts (compare *Haroco* and *Alexander Grant, supra*) suggesting that in certain circumstances, the imposition of a "RICO-type injury" requirement would lead to a circumstance where the proper "victim" could not sue under civil RICO, but where a competing criminal entity or enterprise could do so.

Respondent submits that the imposition of a requirement of a "RICO-type injury," synthesized in the instant case as *either* a racketeering enterprise injury or a competitive injury, is indeed an appropriate holding.* It attempts to *properly* describe the conduct which Civil RICO seeks to deter and punish, without becoming sidetracked into an analysis of the phrase "organized crime," or the ambiguities of a "direct/indirect injury" analysis.

*The implications that the Supreme Court has given specific guidance on the scope and use of civil RICO are incorrect. Neither *United States v. Turkette*, 452 US 576 (1981) nor *Russello v. United States*, __U.S.__, 104 S.Ct. 296 (1983) give guidance in this area. Notwithstanding the fact that *Russello* emphatically restates the Supreme Court's opinion that criminal RICO should be construed broadly to effectuate its purpose, that case dealt with defining the parameters of the civil forfeiture procedures pursuant to a criminal prosecution.

Furthermore, regarding *Turkette*, the Court below held (Opinion at page 22a): "the Court was only discussing congressional intention as to the criminal enforcement provisions of RICO, not the intended scope of the private civil remedy."

POINT II

The Court Below Properly Held That Prior Convictions of Predicate Acts Are Required.

Petitioner claims that "Congress' failure to use the term conviction in Civil RICO manifests an intent not to require previous convictions of predicate acts or of RICO itself."* We must concede that the issue of whether or not conviction of a predicate act is required before the commencement of a suit under Civil RICO, was neither briefed nor argued before the District Court or the Court of Appeals below. However, the Court, even at the time of oral argument, was exceedingly mindful of the unanswered issues concerning the burden of proof and the interrelationship between a Civil RICO prosecution and constitutional rights of defendants under Civil RICO.

What is it that was so disturbing to the Court below that they imposed a requirement which has not previously been discussed at length in any decision of the other Circuit Courts of Appeals? The Court was clearly concerned about issues of burden of proof, having knowledge of the fact that although there has been an explosion of "RICO-type" litigation, there are but a handfull of reported cases of appeals from judgments under RICO cases which have in fact gone to verdict. The Court posed the question in this way:

> "Is one to be held liable under a lesser standard of proof in a private right of civil action and not incidentally, thereby stigmatized as a racketeer? It is hard to believe that in adopting Civil RICO, Congress intended to permit proof of "wilfull" violations by only a

*Petition at pg. 10.

> preponderance of the evidence. Otherwise, two misstatements in a proxy solicitation could subject any director in any national corporation to racketeering charges and the threat of treble damages and attorney's fees." Opinion at pg. 35a.

The Court, in a thorough analysis of precedent regarding the issue of prior criminal conviction, noted clearly that the fountainhead for the other Courts' rejection of this requirement is the case of *United States v. Cappetto*, 502 F.2d 1351 (7th Cir. 1975) Cert. den. 420 U.S. 925 (1975). The Court in the instant action correctly concluded that *Cappetto* dealt only with the imposition of Civil equitable relief on behalf of the government. "Thus, far from determining the question of the intended or appropriate scope of the treble damage remedy provided to private parties under Subsection 1964(c), *Cappetto* made no holding with respect to private civil actions." Opinion at pg. 29a. The Court properly noted that "almost all of the cases that hold that criminal convictions are not necessary rely either on *Farmers Bank*, or *Cappetto* and offer no other reasoning to support their conclusions." Opinion at pg. 30a. The Court viewed the principal inherent danger in not requiring prior convictions in the distinction between the burden of proof of the principal case (preponderance of the evidence) and the requisite burden of proof to show the criminal activity—the predicate acts—themselves. In this regard, the Court emphasized that "Reading private civil RICO suits not to require criminal convictions would provide civil remedies for offenses criminal in nature, stigmatize defendants with the appellation "racketeer," authorize the award of damages which are clearly punitive, including attorneys fees, and constitute a civil remedy aimed in part to avoid the constitutional protections of the criminal law. Thus, the

construction advanced in this opinion avoids serious constitutional questions." Opinion at n. 49, pg. 36a.

In support of this position, the Court referred to commentary which clearly shows that "The act is designed to provide new penalties and remedies to combat conduct which explicitly has already been found criminal" and concluded that "RICO liability simply does not exist without criminal conduct . . . in a civil context, there is no way to know whether the conduct in question is already criminal, a problem compounded by the fact that ordinarily there is a lower burden of proof in civil actions." Opinion at pgs. 37a-38a.

Thus, the Court concluded that "the most logical conclusion to be drawn is that Congress expected the criminality of the predicate acts to be proved before the private action went forward,—that a criminal conviction must proceed a private civil suit." Opinion at pg. 40a.

Petitioner views the holding requiring prior criminal conviction as a "preposterous" proposition. (See petition at page 13). We respectfully disagree. The basic elements of the court's analysis can easily be summarized. First, it determined that the language of the statute was ambiguous. Then, after careful review, the majority determined that much, if not all of the previously used legislative history related to comments regarding criminal sanctions, made before the civil remedy emerged from the House of Representatives for inclusion in the final version of the new statute. Next the Court reviewed the overall intent of the statute and found that it was to further punish already-defined and proven criminal activity. Contrary to twisting statutory construction "into a gordian knot," (Petition at Page 13), this reasoned analysis makes the most of a statute with ambiguous drafting but with admirable basic purposes which should be effectuated by the federal courts if at all possible.

POINT III

The Court Below Did Not Exceed Its Authority In Its Ruling.

The claim is made that those who seek the broadest interpretation of the statute are assisting in the fight whereby private interests can vindicate the victims of certain criminal activity. Indeed, petitioner herein has included statistical data suggesting the magnitude of the loss to the nation's economy resulting from a variety of so-called "organized" or "white-collar" offenses. This is a simplistic argument and one which is not worthy of the litigants in this case or the related cases. In the first instance, what is being discussed is the role of *Civil RICO.* There is no inference from anything to be determined here that the Federal Government should have less than an activist role in the criminal prosecution of organized crime, including the use of RICO's criminal sanctions, and the injunctive relief and forfeiture provisions available to the federal government.* One suspects that the motive in urging a broad interpretation of Civil RICO is not so much to win vindication for true victims of organized criminal behavior but rather to

*As the Court stated in its opinion below (at page 8a):

"There is simply no evidence that in creating RICO, Congress intended to create the broad civil cause of action that the reading of the statute given by its proponents would allow."

expand a potent weapon in what has always been and clearly remains the area of ordinary commercial disputes.

The opinion below properly pointed out that there was a significant prior relationship between the parties in the instant case. In fact, aside from a long-standing business relationship between the owners of the corporate parties, Sedima and Imrex had sold millions of dollars of aerospace components as joint-venturers prior to the time petitioner claimed improprieties in the billings.

The legislative record, early opinions and several commentators have been specifically concerned about the "infiltration" of "legitimate" enterprises by the persons and organizations who should be the target of Civil RICO. We suggest that a dispute as to billing practices between partners was not what the drafters had in mind when they discussed "infiltration" of business by criminal elements.

The Court below clearly chose to act on several concerns expressed by the other circuit Courts of Appeal. However, contrary to the actions of the other circuits, which determined that repair and correction of RICO must be left to the Congress, the Second Circuit determined that the structure of the act can be read *only* if it requires "RICO-type injury" and prior convictions of predicate acts. The claim is made that the Court thereby conducted an "aggressive jurisprudence" which improperly restrained the scope of RICO, which so many Courts and commentators have suggested must be interpreted in a "liberal fashion." We respectfully submit that petitioner is incorrect. It is paradoxical that an attempt to strictly

construe the scope of an important Federal statute has now been labeled "improper aggressive jurisprudence."

We respectfully suggest that those courts and commentators who have permitted a mechanistic reading of the statute, whereby the mere allegation of predicate acts has become enough to bring to bear all the effects of RICO, are those who have conducted an "unnecessarily aggressive" jurisprudence. As the Court stated in its opinion below, there is a "clanging silence" regarding the legislative intent of Civil RICO.* The Court below ably demonstrated what others have not, that the various legislative debates which have been recited by commentators and other courts pertain *strictly* to the Senate's version of the bill and therefore, do not address the issues of Civil RICO which separately arose in the House and on which there is a tremendous paucity of legislative record.

The after-the-fact transference of legislative history from the subject of prosecutorial techniques to private civil remedies would indeed constitute an

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*"The most important and evident conclusion to be drawn from the legislative history is that the Congress was not aware of the possible indications of [s]ection 1964(c). If Congress had intended to provide a federal forum for plaintiffs for so many common law wrongs, it would at least have discussed it. If Congress had intended to provide an alternate and more attractive scheme for private parties to remedy violations of the securities laws—involving decades, statutes, regulations, commentaries, and jurisprudence—it would at least have mentioned it. The House judiciary committee, which offered the provision, would at least have mentioned the amendment to the House as a major change in its report had there been any inkling of its possible implications."

"aggressive jurisprudence." *That* is the liberalization of the law, not the decisions which have sought to properly restrict the law by reading carefully the failure of legislative history, by judging the important relevance of the laws genesis from the anti-trust laws, and by considering the serious constitutional questions involved in permitting the unfettered operation of an enormously powerful civil litigation weapon.

We respectfully suggest that the majority below properly stated the rationale for strict interpretation of the statute, at page 43a of its opinion: "Before we impute to Congress the intention of federalizing a large portion of the common law, which since the time of the Constitution, has been left to the courts of the several states, and of providing treble damages and attorneys fees for violating these laws, or of altogether replacing or eliminating much of the need for extensive bodies of federal law specifically directed at extensively considered evils, we will require more explicit language from Congress indicative of such intent."

CONCLUSION

We are mindful of the split between the circuits in the instant matters. However, we respectfully suggest to this Court that the decision below represents the most comprehensive analysis of, and the most complete definition of the operation and intent of Civil RICO, and we respectfully submit that the petition should in all respects be denied.

Respectfully submitted,

RICHARD EISENBERG
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Statement Pursuant to Rule 28 Of the Supreme Court

Respondent Imrex Company, Inc. does not have a parent company. Imrex Sales Corp. is an affiliate. Imrex Company, Inc. has no subsidiary companies other than wholly-owned subsidiaries.